No. 87-107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,

v.

MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

The American Bar Association hereby moves, pursuant to Rule 36.3, for leave to file the attached brief amicus curiae in support of petitioner's position that *Runyon* v. *McCrary*, 427 U.S. 160 (1976), not be overruled. While consent to file this brief has been obtained from petitioner, counsel for respondent has declined to grant consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

The ABA is a voluntary national organization of lawyers. Its more than 347,000 members come from every state and territory and represent a broad cross-section of the legal profession. The ABA's interest in this case

flows from its opposition to racial discrimination and its concern that the abandonment of such an important and well-established Supreme Court precedent as *Runyon* would be harmful to the legal system.

For many years the ABA has taken a strong position opposing racial discrimination within its own organization, within other institutions of the legal system, and in society at large.[1] Effective legal remedies play a significant role in eradicating racial discrimination. Section 1981 of Title 42 of the United States Code is an important—and, in many instances, the exclusive or superior—remedy for victims of private racial discrimination in the making and enforcement of contracts.

Moreover, the ABA is concerned for its lawyer members and their clients about the overruling by this Court of one of its considered decisions construing a congressional enactment. The legal profession and the clients it serves share an important stake in the proper application of the doctrine of *stare decisis*.[2] In advising clients and formulating litigation strategy, lawyers assume that this Court's interpretations of federal statutes are binding and, except in extraordinary circumstances, enduring. When this Court suddenly abandons its statutory precedents, legitimate expectations based on legal advice are disturbed and public trust in the profession and our legal system is shaken. The ABA has an interest in the Court not overruling statutory precedents absent the most compelling reasons, none of which is present in this case.

As the largest membership organization of lawyers in this country, the ABA brings to this case a perspective that is broader than and different from that of petitioner. The ABA believes that the attached brief conveys that perspective in a manner that would be of assistance to this Court. Accordingly, the ABA respectfully seeks the Court's leave to file the attached brief supporting petitioner.

Respectfully submitted,

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[1] *See* American Bar Association, *Policy and Procedures Handbook* 126 (1987) (describing August 1965 resolution on ABA anti-discrimination policy); American Bar Association Report No. 21 (February 1972) (resolution condemning discriminatory hiring practices within the legal profession); American Bar Association Report No. 124 (February 1980) (resolution supporting legislation prohibiting housing discrimination); American Bar Association Report No. 120 (August 1984) (resolution declaring it inappropriate for judges to belong to discriminatory organizations); American Bar Association Report No. 120 (August 1986) (resolution opposing discrimination in judicial selection).

[2] *See generally* 1 Kent, *Commentaries on American Law* *447 (1826) ("It is by the notoriety of such rules [of binding precedent] that professional men can give safe advice to those who consult them . . . ."); *see also* 1 Hart & Sacks, *The Legal Process* 587 (tent. ed. 1958).

QUESTION PRESENTED

This brief for the American Bar Association as amicus curiae deals only with the question that the Court in its order of April 25, 1988, asked the parties to address on reargument: Whether the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), should be reconsidered.

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

This brief is submitted on behalf of the American Bar Association as amicus curiae in support of the petitioner.

INTEREST OF AMICUS CURIAE

The interest of the American Bar Association is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

For two decades, our Nation's dedication to racial justice has been reflected in and served by the application of 42 U.S.C. § 1981 to prohibit private acts of discrimination in the making and enforcement of contracts. The three branches of the federal government, the legal profession, and those who are directly affected have oper-

ated on this understanding of the statute and ordered their affairs accordingly. The Court's decision in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), rendered in the case of black children denied admission to private schools on account of their race, simply confirmed the settled fact that Section 1981 reaches private conduct. The issue was correctly resolved then. It should not be reopened now.

Independent of the fact that *Runyon* correctly construed Section 1981, the doctrine of *stare decisis* strongly militates against a retreat from that decision. The rule confirmed in *Runyon* derived direct support from earlier decisions of this Court, embraced a construction of Section 1981 already unanimously adopted by the lower courts, and occurred subsequent to congressional action endorsing the Court's interpretation. At the time *Runyon* was decided, the Court heard the relevant legal and factual arguments on both sides of the question, including a dissenting view cogently expressed by Justice White. And events since 1976 do not justify abandonment of this precedent, which has been widely relied upon and which advances important anti-discrimination policies that have gained ever more widespread acceptance in our society.

ARGUMENT

I. *RUNYON* CONFIRMED A PRINCIPLE OF RACIAL JUSTICE ALREADY WELL ESTABLISHED AND PLACED IT BEYOND QUESTION.

Section 1981 guarantees to "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." By its terms, the statute condemns racial discrimination without regard to whether the person guilty of such discrimination is a government official or a private citizen. It has been uniformly construed for the past twenty years to be thus universal in its condemnation of racial discrimination. In the

process, Section 1981 has become a vital, everyday part of civil rights jurisprudence and practice, consistently understood as reaching all forms of racism in the making and enforcement of contracts.

Section 1981 provides an effective and important remedy for acts of racial discrimination, both in instances where no other remedy is available and in others where the remedies available are either inadequate to provide redress or insufficient to serve as reliable deterrents. No other federal statute addresses private school discrimination, the very matter before the Court in *Runyon*. Numerous types of private discrimination—by clubs, small employers, and others—are covered on the federal level only by Section 1981. Even where there is some overlap between Section 1981 and other remedies, the Section 1981 remedy is decidedly superior in various respects. *See* pages 10-11, below.

This Court's holding in *Runyon*, which itself rested on precedent, decisively vindicated the enacting Congress' commitment to racial justice and was thought once and for all to have removed any lingering doubt that Section 1981 prohibits private acts of discrimination. Indeed, the Court opened its discussion of the law in *Runyon* with the observation that "[i]t is now well established that . . . § 1981 prohibits racial discrimination in the making and enforcement of private contracts." 427 U.S. at 168. The Court cited for this proposition *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-60 (1975), and *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973), which dealt with Section 1981, and *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968), the foundation case, which dealt with the companion provision, 42 U.S.C. § 1982, but clearly stated that Section 1981 as well as Section 1982 reached private conduct.

Runyon thus confirmed an interpretation of Section 1981 that had already received the Court's imprimatur and had been applied for several years in the federal

courts.[1] Well before 1976, the Executive also affirmatively recognized that this construction of the law was both correct and well established.[2] Indeed, in its amicus curiae brief in the *Runyon* case, the United States said that "it is now settled that Section 1981 prohibits all racial discrimination, private as well as public, interfering with the making and enforcement of contracts." Brief for the United States as Amicus Curiae at 13, *Runyon* v. *McCrary*.

More important, Congress, whose enactment this Court interpreted in *Runyon* and in the "line of authority"[3] that preceded it, was aware at least as early as 1972 that Section 1981 was being applied to private-sector discrimination in employment and other areas. When legislation was introduced in the Senate to vitiate this application through a partial repeal of Section 1981, it was twice rejected. 118 Cong. Rec. 3372-73, 3965 (Feb. 9 & 15, 1972). Congressional endorsement of this Court's understanding of Section 1981 and active congressional

[1] The district courts interpreted Section 1981 as covering private conduct as early as 1968 and were swiftly followed by an unbroken line of appellate rulings reaching the same result. *See* Dobbins v. Local 212, 292 F. Supp. 413, 442 (S.D. Ohio 1968); Waters v. Wisconsin Steel Works, 427 F.2d 476, 482-83 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1099 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Young v. ITT, 438 F.2d 757, 759-60 (3d Cir. 1971); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972).

[2] *See* Stebbins v. Continental Ins. Cos., 442 F.2d 843, 846-47 (D.C. Cir. 1971) ("The [Equal Employment Opportunity] Commission argues that [Section 1981] creates a cause of action for racial discrimination in private employment . . . ."); *cf.* Brief for the United States as Amicus Curiae at 8-9, Jones v. Alfred H. Mayer Co. ("Nor do we believe there is any textual, historical, or constitutional obstacle to applying [Section 1982] . . . to wholly private action.").

[3] 427 U.S. at 169 (Stevens, J., concurring).

commitment to its judicial application underscore the extent to which the principle of *Runyon* was settled and accepted even before its confirmation by that decision.

In the dozen years since this Court's ruling in *Runyon*, the express inclusion of discriminatory private conduct within the prohibition of Section 1981 has been placed beyond the realm of debate. This is vividly illustrated by the decision of the Court during the 1986 Term in *Saint Francis College* v. *Al-Khazraji*, 107 S. Ct. 2022 (1987). The Court did not question whether Section 1981 reached private conduct but whether discrimination in private employment against an Arab was racial discrimination within the meaning of Section 1981. The Court unanimously held that it was, 107 S. Ct. at 2028, and at the same time held that discrimination against Jews was racial discrimination within the meaning of Section 1982, *Shaare Tefila Congregation* v. *Cobb*, 107 S. Ct. 2019, 2022 (1987). Similarly, the inclusion of private conduct in Section 1981 was the agreed premise in *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982),[4] where the dissenting members of this Court would have extended the statute still farther by holding a private actor liable for *unintended* discrimination.

Decisions such as these have fortified the fact that Section 1981 prohibits private discriminatory conduct. The lower courts and the legal profession have faithfully followed this Court's clear mandate. The issue has long been settled. It should not be unsettled at this late date.

II. THE VALUES UNDERLYING THE DOCTRINE OF *STARE DECISIS* STRONGLY MILITATE AGAINST RECONSIDERATION OF *RUNYON*.

The fact that Section 1981 prohibits private acts of discrimination in the making and enforcement of contracts has been placed beyond dispute during the past

[4] *See especially id.* at 388.

twenty years. This correct understanding has been embraced or accepted by the three branches of the federal government, the legal profession, and both the victims of and participants in discriminatory practices. The expectations and reliance generated during this period alone warrant adherence to the holding in *Runyon* v. *McCrary*. To the extent that major changes in law and society have occurred since *Runyon*, they have only consolidated the policy advanced in *Runyon* condemning all forms of racial discrimination. No legal or social development of the past several years could conceivably justify a retreat from *Runyon*.

Stare decisis is, independent of any other consideration, a compelling reason for not overruling *Runyon*. *Stare decisis*, as this Court has observed, "is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1982). Indeed, it has been said that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*." *Welch* v. *Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941, 2948 (1987) (plurality opinion). *Stare decisis* protects the integrity of the legal system by guaranteeing continuity and predictability in the administration of justice. Because ours is a country dedicated to the rule of law, the doctrine of *stare decisis* is "a natural evolution from the very nature of our institutions." Lile, *Some Views on the Role of Stare Decisis*, 4 Va. L. Rev. 95, 97 (1916).

Stare decisis, like fealty to constitutional and statutory text, is an essential safeguard against the unprincipled exercise of judicial authority. As Hamilton wrote in the *Federalist*, "[t]o avoid an arbitrary discretion in the Courts, it is indispensable that they should be bound down by strict rules and precedents." *The Federalist* No. 78, at 529-30 (Cooke ed. 1961). The point was reiterated by the first Justice White in a dissent ultimately vindicated by the adoption of the Sixteenth Amendment. He said that "[t]he fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (dissenting opinion).

The doctrine of *stare decisis* thus "permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986).[5] Of course, precedent is not a straitjacket. But, as Justice Robert Jackson cautioned, there must be limits on the role judges play in changing the law of a democratic society. "Moderation in change is all that makes judicial participation in the evolution of law tolerable." Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 334 (1944).

Respect for precedent establishes the Court as the guardian of the laws, while disrespect for precedent undermines regard for the Court itself. In his characteristically understated way, Justice Powell put it best: "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitate overruling of . . . precedents." *Garcia* v. *San Antonio Transit Authority*, 469 U.S. 528, 559 (1985) (dissenting opinion).

As a consequence of its centrality in our legal system, *stare decisis* imposes a "severe burden on the litigant who asks [the Court] to disavow one of [its] precedents." *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). "[A]ny departure from the doctrine of *stare*

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[5] *Accord* Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970) (stressing "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments"); Brown v. Allen, 344 U.S. 443, 535 (1953) (Jackson, J., concurring) (deference to precedent sustains confidence in judicial respect for "impersonal rules of law"); Cardozo, *The Nature of the Judicial Process* 112 (1921) (adherence to precedent ensures impartiality).

decisis demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116 (1965).

It is familiar learning that *stare decisis* is least commanding in constitutional cases because there is no easy alternative to overruling by which the Court's constitutional interpretations can be modified. Only the Court could correct the error of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and make the Fourteenth Amendment the instrument of racial justice it was intended to be, as it did in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Congress could not. By contrast, the force of *stare decisis* is greatest in cases involving statutory construction because the lawmaking body is free to correct any error the Court may have made.[6]

Stare decisis in the construction of statutes demands special respect where, as here, Congress has embraced the Court's original holding. Justice Harlan's explanation of his concurrence in *Monroe* v. *Pape*, 365 U.S. 167 (1961), has become a standard formulation of the heavy burden borne by one asking the Court to overrule a precedent Congress has approved.[7] He spoke of both "the policy of *stare decisis*, as it should be applied in matters of statutory construction," and, "to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation." 365 U.S. at 192. He said that the two together "require[d] that it appear *beyond doubt*" that the challenged precedents "misapprehended" the meaning of the

[6] *See* Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 429 n.34 (1986) (citing NLRB v. Longshoremen, 473 U.S. 61, 84 (1985), and Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)); Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 540 (1948); *cf.* Busic v. United States, 446 U.S. 398, 417-18 (1980) (Rehnquist, J., dissenting) ("Were [the issue] demonstrably a case of statutory construction, I could acquiesce to the Court's reading . . . in the interest of *stare decisis*.").

[7] *See* Monell v. New York City Dept. of Social Services, 436 U.S. 658, 715 (1978) (Rehnquist, J., dissenting).

statute in issue "before a departure from what was decided in those cases would be justified." *Id.* (emphasis added). The "indications of congressional acceptance" are as unmistakable in this case as are the demands, apart from congressional ratification, of "the policy of *stare decisis*." Congress, as this Court will be told in other briefs, ratified *Runyon* through subsequent legislation that built on an understanding that Section 1981 meant what *Runyon* said it meant and through explicit rejection of proposed legislation that would have contracted the reach of Section 1981. Particularly in these circumstances, it would be appropriate to leave any modification to Congress.[8]

To be sure, as the listing of cases in the Court's per curiam opinion setting the case for reargument illustrates, the Court has on occasion overruled its statutory precedents. In the Court's overruling decisions, many made according to the less demanding standards for constitutional cases, the extraordinary circumstances that might justify the abandonment of precedent are identified. Precedent may be disregarded when the rule of a case has proven unexpectedly difficult to apply;[9] when changed legal circumstances have created an internal inconsistency between an important and ongoing legal policy and an earlier, discredited legal regime;[10] when changed mores have rendered the earlier decision incompatible with social progress;[11] or when new and unanticipated considerations have emerged since the time of the

[8] *See* Flood v. Kuhn, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long-standing that is to be remedied by the Congress and not by this Court. . . .").

[9] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 539-547 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).

[10] *See* Puerto Rico v. Brandstad, 107 S. Ct. 2802, 2809 (1987), *overruling* Kentucky v. Dennison, 24 How. 66 (1861).

[11] *See* Cardozo, *The Nature of the Judicial Process* 151-52 (1921); *see, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).

initial decision, providing judges with unforeseen and unforeseeable information.[12]

Runyon v. *McCrary* exemplifies a decision entitled to *stare decisis*. The recognized exceptions to *stare decisis* simply do not apply. The rule of *Runyon* was being applied well before 1976 and it has been successfully applied and extended since then. *Runyon* itself embodies a policy of the highest order of importance, one that has engaged our lawmakers more perhaps than any other in recent years, the policy of extirpating racial discrimination. Changes in mores since *Runyon* have been in exactly the anti-discrimination direction signaled by the Court's decision.

Finally, no unanticipated evidence or results have emerged to alter the issues considered by the Court in deciding *Runyon*. The factors that argued for and against the *Runyon* interpretation of Section 1981 were fully aired and considered at the time. The reasoned opinion in *Runyon* was correct and should not be subject to periodic revisitation.[13]

The reliance and expectations generated by this Court's decisions in *Runyon* and its antecedents also present a compelling reason for leaving it undisturbed. Because the remedies provided by Section 1981 exceed in scope the remedies provided by other anti-discrimination laws, overruling *Runyon* would work a forfeiture on many individuals, including those who have relied upon their lawyers' advice in situations where an alternative remedy or procedure was available. For example, a trial by jury is guaranteed in an action for damages under Section 1981; it is not available under Title VII of the Civil Rights Act of 1964. Section 1981 confers on plaintiffs the right

[12] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 766 (1984).

[13] *Cf.* Patsy v. Board of Regents, 457 U.S. 496, 517 (1982) (White, J., concurring) ("Whether or not this initially was a wise choice, these decisions are *stare decisis*.").

to recover punitive damages; by contrast, Title VII limits monetary relief to back pay. The longer statute of limitations and more favorable remedial regime of Section 1981, together with fears of *res judicata*, make it virtually certain that numerous clients, on their lawyers' advice, will have forgone Title VII or state law claims because of what was represented to be the availability of a Section 1981 remedy. Their legitimate expectations would be thwarted were *Runyon* to be overruled. This Court has emphasized that adherence to precedent is crucial when such reliance interests are at stake: "[I]f the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance." *United States* v. *Mason*, 412 U.S. 391, 399-400 (1973); *see also Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 n.5 (1985) (plurality opinion).[14]

The long-standing and well-considered principle of racial justice confirmed in *Runyon* strongly suggests that it should not be reconsidered. Any doubt in this regard, however, should vanish when one considers the pattern of congressional endorsement of the principle and the extent to which it has been relied upon. In light of the manifest inapplicability of the exceptions to *stare decisis*, *Runyon* should be left undisturbed.

[14] While *stare decisis* should not be blindly applied, its unjustified abandonment would impair lawyers' ability to provide meaningful advice. In earthy language, John W. Davis once suggested that clients would substitute casting dice for consulting lawyers if their expectations were dashed by a practice of overruling precedents. Harbaugh, *Lawyer's Lawyer* 416 (ed. 1978) (quoting 1942 letter to *Hartford Courant*).

CONCLUSION

Runyon v. *McCrary* was correctly decided. The Court should decline to reconsider it.

Respectfully submitted,

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